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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

No. 85-1673 (2)

ROBERT GORDON MILLER, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

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QUESTION PRESENTED

Whether this Court has appellate jurisdiction pursuant to 28 U.S.C. §1257(3) to review a decision of a state supreme court which is based on independent and adequate state law grounds?

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OPINION BELOW

The Per Curium Order of the South Carolina Supreme Court dated February 11, 1986, is reproduced in Petitioner's Appendix to Petition for Writ of Certiorari.

JURISDICTION

The Order of the South Carolina Supreme Court was entered on February

11, 1986. This Court's jurisdiction was invoked by Petitioner pursuant to 28 U.S.C. §1257(3). Respondent respectfully maintains that for the reasons discussed herein Petitioner has not satisfied the burden of proof in establishing this Court's appellate jurisdiction.

QUESTION PRESENTED

Does this Court have appellate jurisdiction pursuant to 28 U.S.C. §1257(3) to review a decision of a state supreme court which is based on independent and adequate state law grounds?

ARGUMENT

Petitioner was charged in state court with murder, housebreaking and larceny and the State sought the death penalty. When the State rested its case during the guilt phase, Petitioner moved for a directed verdict of acquittal. He

claimed the State had not presented sufficient evidence placing Petitioner at the scene of the crimes. (Tr. p. 420, line 13 - p. 450, line 7).

Rather than ruling on Petitioner's motion, the trial judge took the motion under advisement and left the question of Petitioner's guilt or innocence to the jury. (Tr. p. 450, line 8 - p. 451, line 9). The jury returned a guilty verdict as to all charges. Thereafter, the trial judge granted Petitioner's motion for a judgment of acquittal notwithstanding the verdict. (Tr. p. 455, lines 13-19; Tr. p. 459, line 14 - p. 461, line 16).

The State then appealed. In State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985), the South Carolina Supreme Court reversed the trial judge as to the murder and larceny counts. The court

held that because there was competent evidence to sustain the jury's verdict as to these charges, the trial judge erred by substituting his judgment for the jury verdict. It thereafter reinstated the conviction for murder and larceny. Id. at ___, 337 S.E.2d at 885-886. The court remanded the case for sentencing pursuant to §16-3-20, Code of Laws of South Carolina (Supp. 1984).

Petitioner next petitioned that court for a rehearing. The court denied the petition, however, without addressing Petitioner's double jeopardy argument. Following remand, Petitioner made a motion before the trial judge on the ground of double jeopardy for an order staying the sentencing proceeding and dismissing the State's notice of intent to seek the death penalty. The trial

judge denied the motion and Petitioner appealed to the South Carolina Supreme Court.

In its February 11, 1986, Order, the court held that under South Carolina law, an order denying a double jeopardy claim is not immediately appealable. See also State v. Wyatt, 115 S.C. 325, 105 S.E. 70 (1921); State v. Hill, 74 S.C. 415, 545 S.E. 614 (1906). The court expressly held that:

> The appeal is dismissed without prejudice to appellant's right to raise these issues on appeal from final judgment. We express no opinion on the merits of appellant's double jeopardy claims.

(Emphasis added).

Thus, it is clear that the order which Petitioner asks this Court to review was decided upon the basis of South Carolina procedural law. C.f., Caldwell v. Mississippi, ___ U.S. ___,

105 S.Ct. 2633, 2639 (1985) (claimed procedural law must actually be relied upon). A criminal defendant in South Carolina may not appeal until sentence has been imposed. See §14-3-330, Code of Laws of South Carolina (1976, as amended). See also, e.g., State v. Washington, ___ S.C. ___, 330 S.E.2d 289 (1985); State v. Robinson, ___ S.C. ___, 337 S.E.2d 204 (1985) (trial in absence, appeal prior to sentence); State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983) (order committing defendant to Department of Mental Health); State v. Hubbard, 277 S.C. 568, 290 S.E.2d 817 (1982) (denial of motion to suppress evidence); State v. Parker, 267 S.C. 317, 227 S.E.2d 677 (1976) (denial of motion to quash indictment); Ex parte Murray, 261 S.C. 255, 199 S.E.2d 718 (1973) (adjudication of delinquency, but

withholding disposition); State v. McMillan, 189 S.C. 444, 1 S.E.2d 626 (1939) (denial of motion to quash indictment); State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930) (overruling demurrer to an indictment); State v. Turner, 118 S.C. 383, 110 S.E. 525 (1922) (denial of motion to quash indictment); State v. Mason, 54 S.C. 240, 32 S.E. 357 (1899) (denial of motion to quash indictment); State v. Burbage, 51 S.C. 284, 28 S.E. 937 (1898) (denial of plea in abatement); State v. Hightower, 33 S.C. 598, 11 S.E. 579 (1890) (appeal prior to imposition of sealed sentence); State v. McKettrick, 13 S.C. 439 (1880) (appeal after conviction, trial judge refused to sentence).

This Court has no supervisory jurisdiction over state courts. Chander

v. Florida, 449 U.S. 560, 570 (1981). Therefore, the Court will decline to review state court decisions which rest upon independent and adequate state grounds. Henry v. Mississippi, 379 U.S. 443, 446 (1964), reh. denied, 380 U.S. 926 (1965). In Michigan v. Tyler, 436 U.S. 499 (1978), the Court cited Henry v. Mississippi, supra, and stated "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." Id. at 512, n.7.

It is respectfully submitted that South Carolina has a legitimate interest in enforcing the rule prohibiting appeals in criminal cases until such time as sentence is imposed. As the

South Carolina Supreme Court explained in State v. Burbage, supra:

> It is a bad practice, and generally condemned, to have appeals by piecemeal, especially in criminal cases: for it is destructive of the prompt administration of justice, which is so essential to the peace of society. Besides, it leads to an unnecessary consumption of the time of this court, which could be much better employed than in considering or determining questions which may never become of any practical importance in a given case.

51 S.C. at ___, 28 S.E. at 938.

Petitioner, in fact, points out the validity of this legitimate interest by his admission that if the South Carolina Supreme Court had "done no more than ... remanded the case for imposition of a sentence other than death, petitioner would concede ... this case would be controlled by United States v. Wilson, 420 U.S. 332 (1975)." Therefore,

Petitioner admits that if any sentence other than death is imposed, there is no double jeopardy problems, and an appeal as to that issue would not be warranted. (Brief of Petitioner, p. 17). Respondent would submit that this interest does not lose its legitimacy simply because there is a possibility the Petitioner may be sentenced to death.[1]

Further unlike the situation in Caldwell v. Mississippi, supra, and Henry v. Mississippi, supra, Petitioner may still present his alleged double jeopardy violation to the South Carolina

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[1] Because of the obvious importance of all death penalty cases and the amount of time and effort necessary to prepare for the sentencing phase in this particular case, Respondent would respectfully request that this Court expedite its consideration of the case.

Supreme Court. See State v. Washington, supra; State v. Wyatt, supra. See also, Abney v. United States, 431 U.S. 651 (1977); C.f., Flynt v. Ohio, 451 U.S. 619 (1981) (finality in context of criminal prosecution, finality of judgment for purposes of Supreme Court review is normally defined by imposition of sentence.)

Nor has this Court created a federal constitutional right to appeal denial of a double jeopardy claim by a state court prior to imposition of sentence. There is no federal constitutional right to appellate review of a criminal conviction. That right is conferred by statute. Abney v. United States, supra; Estelle v. Borough, 420 U.S. 534 (1975). See also §14-3-330, Code of Laws of South Carolina (1976, as amended); 28 U.S.C. §1291. To exercise

this statutory right, a defendant must meet the requirements of the applicable statute. Abney v. United States, supra.

In support of his argument, Petitioner cites Bullington v. Missouri, 451 U.S. 430 (1981) and Arizona v. Rumsey, 467 U.S. 203 (1984). Neither of these cases, however, has recognized the proposition that a denial of a double jeopardy claim may be appealed prior to imposition of sentence. In both cases, the defendants were found guilty of murder in the guilt phase of a bifurcated trial, then each underwent a sentencing proceeding wherein they were given life imprisonment. The defendant in Rumsey was sentenced to death on remand following an appeal of the original sentence. In Bullington, the Supreme Court of Missouri issued a writ of prohibition holding the double

jeopardy clause did not bar imposition of the death penalty when defendant had been successful in his motion for a new trial. In both cases, this Court held that imposition of the death penalty at the second sentencing proceedings was barred by the double jeopardy clause. Neither case, however, gives a defendant the right to appeal prior to a sentence being imposed in the first instance.

Moreover, the present situation is readily distinguishable because Petitioner has never been sentenced, though convicted by the jury at his first trial. Thus, unlike Rumsey and Bullington, the proceeding on remand involves his original sentencing proceeding.

Therefore, it is respectfully submitted that this Court does not have appellate jurisdiction pursuant to 28

U.S.C. §1257(3) to review the decision of which Petitioner complains. The February 11, 1986, Order of the South Carolina Supreme Court was decided solely upon the basis of state procedural law and this provides an independent and adequate ground barring review by this Court.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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